artificially high in urban areas, NetCo could help to discourage entry into the more attractive urban markets while allowing ServeCo's rural services to remain profitable. The only way to eliminate this incentive is to eliminate the ability of NetCo or its owner to benefit from the market success of ServeCo.

III. The Commission Should Explore Alternative Approaches to Structural Separation

As shown in the preceding sections, the issues raised by LCI are both valid and crucial to the achievement of a competitive telecommunications market. However, the remedies proposed by LCI do not go far enough to resolve the problems it has identified. The Commission has essentially two choices under these circumstances. It can dismiss the LCI petition as insufficient and allow the abuses identified in that petition to continue unchecked; or it can broaden the scope of this proceeding to include consideration of remedies going beyond LCI's proposal, considering the substantial public interest benefits achievable if the conflict of interest problem can be solved. Obviously, Level 3 favors the latter option.

Elimination of the BOCs' (and other LECs') loop bottleneck would yield major public benefits to the public. If control of the loop could be separated effectively from the BOCs' competitive interests, there would be no incentive to limit competitive access to these facilities or to price them in a discriminatory or strategic manner. (Of course, regulation of price levels would continue to be needed to prevent monopoly pricing, as LCI recognizes.) Under these conditions, the competitive market can be expected to develop a wide range of innovative new telecommunications services that will rapidly advance the options available to both residential and small business customers. Although telecommunications switching has advanced at much the same rate as computer technology, since both are based on integrated circuits and microprocessors, and fiber optic technology has advanced at a similarly fast

pace in recent years, fairly little of the benefits of these productivity gains has been realized by residential and small business users. Opening up the loop bottleneck would allow these benefits to flow through to all users, just as it would allow much greater volumes of information to flow over the local loop. It would stimulate new investment and innovation in local telecommunications services that could be expected to have a significant positive impact on the American economy as whole, continuing and even accelerating the rapid improvement in American competitiveness experienced over the past decade.

We have already explained why neither a simple grant nor dismissal of the LCI Petition would provide a satisfactory resolution of the bottleneck issues identified by LCI. Moreover, since LCI proposed that adoption of its "Fast Track" proposal be strictly at the option of the BOCs, and it is likely that few if any BOCs would be willing to accept that offer, approval of the LCI Petition would probably be an empty gesture in any event. Rather than turn its back on these issues, the Commission should embrace this opportunity to investigate alternative approaches to the problem of the loop bottleneck. Since the comments on the LCI Petition are likely to be limited to the merits of LCI's particular approach, and interested parties should have an opportunity to comment on the broader issues discussed above, the Commission should immediately solicit a further round of comments discussing alternative policy approaches to the bottleneck issue.

In the following sections, we outline some potential approaches on which the Commission should seek comments. These suggestions are intended as possible areas for exploration, but may not encompass the Commission's full range of options. Other parties, including the BOCs, may have other suggestions that are worthy of consideration.

A. The "Independent System Operator" Concept

LCI's Petition mentions briefly, at pages 35-36 of its Petition, regulatory decisions to restructure the electric power industry as analogies to its proposal. In particular, it notes that California (among other jurisdictions) has required electric utilities to turn over control—but *not* ownership—of their bottleneck transmission facilities to an "independent system operator" or ISO. The ISO approach is actually much more consistent with the structural separation objectives set forth in Section II of these comments than is LCI's "Fast Track" proposal. Unlike "Fast Track," an ISO structure would remove the BOCs' control over the bottleneck loop facilities by establishing an independent entity to manage and operate these facilities. Because the BOCs would continue to retain ownership of the loop network, but would contract with the ISO to operate their facilities, there would be no issue of an "uncompensated taking" of property as long the ISO continued to charge regulated rates for use of the loop and paid the net proceeds of these rates (less its operating expenses) to the owner of the facilities.

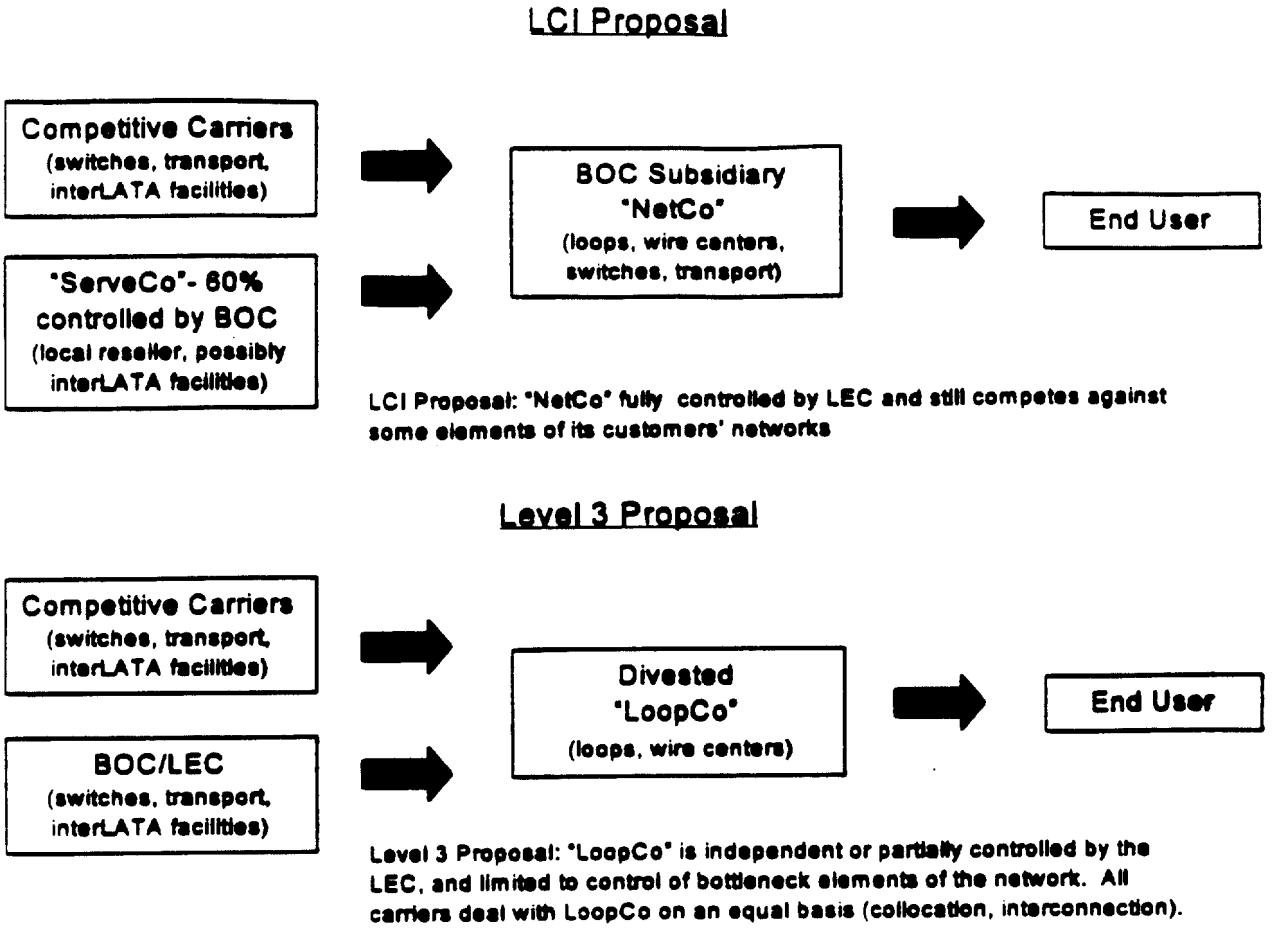
Under an ISO structure, the BOC would have to lease back loops from the ISO for use in providing retail (or wholesale) service to its customers, at the same price and in precisely the same manner (including the same access to operations support systems) as any other carrier. The BOC, like any other carrier, would have the option of constructing its own facilities to access customer premises instead of using the facilities controlled by the ISO; however, any such facilities would be built at the BOC's own risk and there would be no assurance of a regulated rate of return on this investment. These rules would assure that the ISO would have a strong economic incentive to charge cost-based, geographically-deaveraged rates for local loops in order to avoid construction of uneconomic facilities by other carriers.

Although an ISO certainly could be established on a voluntary basis, similar to the LCI proposal, the Commission should also consider whether it has legal authority under existing statutes to require BOCs or other incumbent LECs to participate in such a structure. Alternatively, the Commission should consider whether additional incentives besides interLATA relief (for example, price cap relief, pricing flexibility, forbearance, or other incentives) could be offered to LECs to encourage them to participate in an ISO. Along with the carrot, the Commission should also consider the stick of tightening regulatory restrictions on carriers that refuse to participate.

B. Full or Partial Divestiture of "LoopCo"

As another alternative, the Commission should consider requiring LECs to divest their bottleneck loop facilities, including central office buildings. The loops would be owned by a "LoopCo" (rather than the "NetCo" in LCI's proposal, which would control other facilities in addition to loops). Level 3's proposed "LoopCo" structure is compared to LCI's "NetCo" proposal in Figure 1, below. Other carriers, including the BOC, that wanted access to the loops would pay LoopCo for access to the central office (or other interconnection points) and connection to the loops, as well as (optionally) collocation of switches or other equipment in the buildings. Space rental rates which already exist in RBOC collocation tariffs and agreements can be used as a basis for establishing these relationships.

Figure 1



The LoopCo could either be a completely separate entity from the BOC (*i.e.*, complete divestiture through a spin-off of stock to the public), or a partially divested entity (similar to ServeCo in the LCI proposal). Empire City Subway Company, a subsidiary of Bell Atlantic which controls access to underground conduits in some boroughs of New York City, is an example of a separate subsidiary that has some of the characteristics of the proposed LoopCo. Empire City Subway provides access to its conduits both to Bell Atlantic and to other telecommunications carriers, ostensibly on a non-discriminatory basis, and subject to regulatory oversight. Of course, the greater the ownership interest (and potential control) that a BOC retained in LoopCo, the greater would be

the need for regulatory oversight of that relationship. One possible method of diluting the BOC's control over LoopCo would be to require a minimum number of outside public directors on the board of LoopCo, similar to the approach the Commission has taken with certain Comsat subsidiaries.

Conclusion

The LCI Petition raises an issue of the most central importance to telecommunications policy; namely, how to allow incumbent carriers to participate in competitive markets while at the same time preventing abuse of their control of bottleneck facilities. By filing this Petition and drawing attention to this issue, LCI has performed a major service to the Commission, to the entire industry, and to the public. Unfortunately, however, its proposed remedy for the problem falls short of accomplishing its stated aims.

Level 3 strongly supports LCI's goals of eliminating BOC conflicts of interest, promoting non-discriminatory and reasonably-priced access to bottleneck facilities, and (when these conditions are met) expediting BOC entry into long-distance service and removal of unnecessary regulatory restraints on these companies. To this end, Level 3 encourages the Commission to solicit further comments, on an expedited schedule, to allow it to consider other policy

options besides the LCI proposal and to permit it to develop an effective and lasting solution to the bottleneck problem.

Respectfully submitted,

Terrence J. Ferguson
Senior Vice President and General Counsel
Level 3 Communications, Inc.
3555 Farnam Street
Omaha, Nebraska 68131
(402) 536-3624 (Tel.)
(402) 536-3632 (Fax)

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March 1998, copies of Comments of Level 3 Communications, Inc. were served by first class mail or hand delivered on the following:

Anne K. Bingaman
Douglas W. Kinkoph
LCI International Telecom Corp.
8180 Greensboro Drive
Suite 800
McLean, Virginia 22102

Peter A. Rohrbach
Linda L. Oliver
Hogan & Hartson
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Rocky N. Unruh
Morgenstein & Jubelirer
One Market
Spear Street Tower, 32nd Floor
San Francisco, California 94105

Eugene D. Cohen
326 West Granada Road
Phoenix, Arizona 85003

Janice M. Myles
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 544
Washington, D.C. 20554

International Transcription Service
1231 20th Street, N.W.
Washington, D.C. 20036

Terrence J. Ferguson

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 1998, copies of the foregoing Comments of Level 3 Communications, Inc. were served by first class mail, postage prepaid, or by hand, on the following:

Magalie R. Salas, Esq.
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Janice M. Myles
Common Carrier Bureau
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, D.C. 20554

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036

John T. Lenahan
Christopher Heimann
Frank Michael Panek
Gary Phillips
Attorneys for Ameritech
Room 4H84
2000 West Ameritech Center Drive
Hoffman Estates, Illinois 60196-1025

William T. Lake
John H. Harwood II
Jonathan J. Frankel
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037

John Thorne
Robert Griffen
Bell Atlantic
1320 North Court House
8th Floor
Arlington, Virginia 22201

Richard Taranto
Farr & Taranto
2445 M Street, N.W.
Suite 225
Washington, D.C. 20037

Robert B. McKenna
Jeffry A. Brueggeman
US WEST, Inc.
1020 19th Street, N.W.
Washington, D.C. 20036

Terrence J. Ferguson-/cp
Terrence J. Ferguson

EXHIBIT B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-11
In the Matter of	)	
	)	
Petition of U S WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-26
In the Matter of	)	
	)	
Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Capability	)	CC Docket No. 98-32

COMMENTS OF LEVEL 3 COMMUNICATIONS, INC.

Terrence J. Ferguson
Senior Vice President and General Counsel
Level 3 Communications, Inc.
3555 Farnam Street
Omaha, Nebraska 68131
(402) 536-3624 (Tel.)
(402) 536-3632 (Fax)

Table of Contents

Summary

No one can argue that a primary goal of the Telecommunications Act of 1996 is to accelerate the deployment of advanced telecommunications capabilities to all Americans. The BOCs' transparent effort to bootstrap one statement of that policy as a means to eviscerate the key mechanisms provided in the Act to achieve that goal is so extreme, and without legal support, that the petitions appear to be part of a concerted effort to develop a foundation for amending, rather than implementing, the Act. The petitions should be denied.

The relief requested by the BOCs is beyond the legal authority of the Commission to grant. There is simply no basis to support the concept that Section 706 is an independent source of Commission authority that may be used to override the specific provisions prohibiting the relief requested, until the BOCs have met the requirements of Section 271 by opening the local markets to competition. Even if the Comission had the authority to grant the sweeping relief requested, a grant would have the perverse effect of vastly expanding the BOCs' present ability to frustrate the goals of Section 706 through their use of their existing monopoly control over the bottleneck elements necessary to accelerate the deployment of advanced telecommunications capabilities. Without efficient and affordable access to the BOC-controlled loops, advanced telecommunications capabilities cannot be provided to the vast majority of residential and small and medium-sized businesses.

The sweeping relief requested is both unnecessary and contrary to the policy goals of Section 706. Any inquiry into the underlying facts would demonstrate that market forces are already addressing the burgeoning demand for data transmission capacity. New entrants, such as Level 3, as well as existing providers, have already invested, and have committed to invest, billions of dollars to address the backbone infrastructure needs. None of these players, however, can overcome the BOCs' control of their loop and wire office bottle-

necks. The problems competitors have already encountered obtaining access to these bottleneck facilities will be exacerbated if the BOCs' requests for relief are granted.

The technology to bridge the last mile in the provision of advanced telecommunications services exists, but the BOCs and other ILECs control the transmission facilities needed to use the technology. As Level 3 explained in its recent comments in Docket No. 98-5, history teaches that the only way to eliminate the BOCs' interest in preserving their downstream markets by impeding competitive access to their bottleneck facilities is divestiture of those facilities. BOCs should then be required to obtain access to these bottleneck facilities on an arms-length basis, just as their competitors have to do. If they take these steps, BOCs should have no difficulty satisfying the Section 271 criteria for interLATA relief, and in qualifying for nondominant status for their advanced telecommunications services, thereby achieving the relief requested in these petitions.

Unless divestiture of BOC bottleneck facilities occurs, the Commission has neither the authority nor the public interest basis to support a grant of the BOCs' petitions. Divestiture would accelerate the deployment of advanced telecommunications capabilities to all Americans. A grant of the petitions would frustrate that goal. The petitions should be denied.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-11
In the Matter of	)	
	)	
Petition of U S WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-26
In the Matter of	)	
	)	
Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Capability	)	CC Docket No. 98-32

COMMENTS OF LEVEL 3 COMMUNICATIONS, INC.

Level 3 Communications, Inc. ("Level 3"), pursuant to the Commission's *Public Notice*, DA 98-513 (rel. March 16, 1998) respectfully submits the following comments concerning the Petitions of Bell Atlantic, Ameritech, and US WEST (collectively, the "BOCs") for forbearance from and waivers of various statutory provisions and Commission regulations with respect to their proposed offerings of "advanced telecommunications" services.

As explained below, the Commission lacks statutory authority to grant the relief sought by the BOCs. Moreover, even if such authority existed, the relief sought would be contrary to the public interest. The statutory provisions of which the BOCs complain were adopted to limit their ability to abuse their control of bottleneck facilities. In this context, the bottleneck facilities are unbundled loops

and wire center buildings; competitors cannot provide advanced telecommunications services to residential and small business customers without access to these facilities. The statutory limits on abuse of the bottleneck should not be loosened unless and until the BOCs remove the need for these limits by divesting themselves of their bottleneck facilities.

Introduction

Level 3, formerly named Kiewit Diversified Group, Inc.,[1] has recently announced plans to refocus its assets from multiple industries, and concentrate on its telecommunications and information services business. The company intends to provide a full range of information and communication services, primarily to businesses, over the first end-to-end network designed and built specifically for Internet Protocol (IP) based services. Level 3 expects to offer services over interconnected local and long distance networks it is building across the United States, and to expand internationally.

Level 3's business plan gives it a very keen interest in the issues raised by the BOC Petitions. Level 3 intends to become a leading provider of advanced telecommunications capabilities, both nationwide and internationally. Although the services that the BOCs describe in their Petitions would to some extent compete with Level 3, they would also be potential users of Level 3's network. Level 3 therefore looks forward to the eventual entry of the BOCs into the broadband digital communications marketplace, but only when (and if) *all* participants in that market are assured reasonable and non-discriminatory access to the BOCs' bottleneck local exchange facilities.

---

[1]Under its former name, Level 3 was the original majority stockholder of MFS Communications Company, Inc. Our current management team includes many former MFS executives. Additional information about Level 3 is available on the Internet at <http://www.L3.com/>.

Level 3 has recently filed comments in CC Docket No. 98-5 that address in detail the bottleneck issues facing providers of high-bandwidth digital communications services.[2] Rather than repeat those facts and arguments here, Level 3 attaches a copy of its comments on the LCI Petition as Exhibit A hereto, and incorporates them by reference. As explained in Exhibit A, TCP/IP-based communications networks, such as Level 3's, will face even more significant bottleneck issues than competitive networks built to traditional telephony standards. IP networks face both physical and bandwidth bottlenecks in seeking "last-mile" access to customers' premises. The full potential of these networks cannot be realized unless their operators can obtain technically efficient and economically reasonable access to the bandwidth of the embedded loop network. Without such access, only those businesses that can afford dedicated high-capacity facilities will be able to benefit from the full potential of Internet-based information and other packet-switched telecommunications services. Efficient and affordable access to loops will be the only viable means of bringing these services to the vast majority of residential consumers, as well as many small and mid-sized businesses who cannot afford high-capacity facilities.

ARGUMENT

1. The Substantial Public Interest in Deployment of Advanced Telecommunications Services Must be Balanced with the Danger of BOC Bottleneck Abuses

The BOC Petitions argue that accelerating the deployment of advanced telecommunications capabilities is an important national goal, and Level 3 agrees completely. Congress has made it abundantly clear, in Sections 7(a) and 254(b)(2) of the Communications Act of 1934 (the "1934 Act"), 47 USC §§

---

[2]Comments of Level 3 Communications, Inc., *In the Matter of Petition of LCI Telecom Corp. for Declaratory Rulings,* CC Docket No. 98-5 (filed Mar. 23, 1998).

157(a), 254(b)(2), and Section 706 of the Telecommunications Act of 1996 (the "1996 Act"), that the public policy of the Nation is to facilitate the widespread deployment of these services. Further, the economic benefits to the Nation of promoting investment in and deployment of broadband network capacity and new applications using that capacity are likely to be tremendous.

However, this goal cannot be achieved by putting on blinders and ignoring the policies and specific requirements contained in the rest of the 1934 and 1996 Acts. First, the language of the statutes will not permit the Commission to do this. Second, apart from this legal obstacle, granting the sweeping relief sought by the BOCs would in fact frustrate, not advance, the goals of Section 706 of the 1996 Act, by ignoring the harm that the BOCs can do through abuse of their bottleneck facilities.

2. The Commission Lacks Statutory Authority to Grant the Relief Sought by the BOCs

With remarkable consistency, each of the BOCs argues that the Commission should use forbearance authority under Section 706 of the 1996 Act to permit it to provide interLATA broadband transmission services, without being required to unbundle network elements used in providing these services or to offer wholesale discounts to resellers of these services. Although this argument is undoubtedly creative, it is so extreme and so legally flimsy that one must view the BOC Petitions as political manifestos rather than serious requests for relief. The BOCs' strategy seems to be to ask for relief that they know the Commission cannot grant, so that they can then turn to Congress and demand amendment of the Act to achieve their goals. For this reason, the Commission should not limit itself to simply dismissing the BOC Petitions on legal grounds, but should also analyze their policy deficiencies as discussed in Section 3, below.

A. Section 706 of the 1996 Act Does Not Authorize the Commission to Forbear from Enforcing Sections 251 and 271 of the 1934 Act

The BOCs argue that because Section 706(a) of the 1996 Act includes the word "forbearance," it somehows constitutes a sweeping grant of authority to the Commission that overrides any contrary provision of law. The plain language of the statute will not support this interpretation. Section 706(a) states as follows:

> (a) In General.--The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

The contention that Section 706 is an affirmative grant of forbearance power fails for at least three independent reasons. First, it is contrary to the language of the section itself, read in context. The section is a general statement of policy that was not codified in the United States Code either in 47 U.S.C. or elsewhere; and, unlike those provisions of the 1996 Act that conferred new authority on the Commission, was not enacted as an amendment to the 1934 Act. Section 706 cannot reasonably be construed as a positive grant of authority; rather, it plainly is a policy statement directing the Commission *how to use* the authority granted to it in other provisions of law. This interpretation is bolstered by the fact that every specific action mentioned in Section 706 is something the Commission already has authority to do under provisions of the 1934 Act-- price cap regulation under Section 201 (authority which the Commission had exercised for years before adoption of the 1996 Act), forbearance under Section 10, and "measures that promote competition in the local telecommuni-

cations market" under Sections 251 to 260. If the Congress had meant to expand the Commission's substantive powers by adopting Section 706, it would not have limited itself to listing powers that the agency already had.

Second, it is contrary to the accepted rule of statutory construction that more specific provisions prevail over general ones. Section 706 makes only a very general reference to forbearance. By contrast, Section 10 of the 1934 Act, 47 USC § 160, which was adopted as part of the 1996 Act, contains very specific provisions governing forbearance. In particular, Section 10(d) provides as follows:

> Except as provided in section 251(f) of this title, the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.

This specific provision must control the general reference to forbearance in Section 706.

Third, it is contrary to common sense, because adopting the BOC interpretation would render most of the 1934 Act meaningless with respect to advanced telecommunications. Indeed, this is a case where the BOCs should heed the maxim, "Be careful what you wish for, because you might get it." As already noted, Section 706 mentions (among other things) "measures that promote competition in the local telecommunications market" in the same breath with "regulatory forbearance." If this section allows the Commission to ignore the limitations on its forbearance authority under Section 10 of the 1934 Act to promote advanced telecommunications, then it must equally allow it to ignore limitations on its authority under Sections 251 and 252 to "promote competition" in the provision of advanced telecommunications. In other words, if the BOCs are right, then Section 706 must grant the Commission authority to prescribe

interconnection and unbundled element rates and wholesale discounts for advanced telecommunications capabilities, even though it might not be empowered to do so for any other service.[3]

Even more broadly, Section 706 directs the Commission to use "other regulating methods" to remove barriers to infrastructure investment. If this section means what the BOCs say it does, then this language would allow the Commission to do *literally anything*, including things specifically prohibited by other laws, as long as it made a finding that the action was necessary to remove barriers to investment in advanced telecommunications infrastructure. As tempting as it may be to suggest ways in which the Commission could use such limitless authority to advance the development of local competition, it seems highly unlikely that Congress intended to grant, or that reviewing courts would cash, such a regulatory "blank check." Finally, Section 706 directs not only the FCC but also the State commissions to promote advanced telecommunications services. If this is an affirmative grant of power, then it amounts to a blanket federal preemption of State law, not only allowing but requiring State commissions to disregard the specific directives of State law if necessary to promote advanced telecommunications. The Commission cannot accept the BOC interpretation of Section 706 without opening the door to all these absurd consequences.

B. The Commission Does Not Have Authority to Create a "Global LATA" for Data Services

As a fallback to their argument that the Commission should exempt its data services from Section 271 completely, Ameritech and Bell Atlantic also suggest that the Commission should redefine LATA boundaries so that all data

---

[3] *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), cert. granted, *AT&T v. Iowa Utilities Board* (U.S. Jan. 26, 1998).

services would be intraLATA. This, too, is beyond the Commission's statutory powers. Section 3(25) of the 1934 Act defines "LATA" as follows:

> (25) LOCAL ACCESS AND TRANSPORT AREA.--The term "local access and transport area" or "LATA" means a contiguous geographic area--
>
> > (A) established before the date of enactment of the Telecommunications Act of 1996 by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or
> >
> > (B) established or modified by a Bell operating company after such date of enactment and approved by the Commission.

Although subsection (B) of this section does authorize the Commission to approve modifications of LATA boundaries, this grant of authority must be construed in a manner consistent with the rest of the 1934 Act. If the Commission could simply define the entire world as a single LATA for data services, then it could (at least in theory) do the same for voice service as well, and effectively repeal Section 271. For this provision to be consistent with the rest of the statute, the Commission's authority to modify LATA boundaries must be exercised in a manner consistent with the purposes of the AT&T Consent Decree provisions that established LATAs. Congress surely intended this provision to be used only for incremental modifications of LATA boundaries, not to eliminate them entirely.

3. The Sweeping Relief Sought by the BOCs is Both Unnecessary and Contrary to the Policy Goals of Section 706

A fundamental premise of all three BOC Petitions is that the goals of Section 706 can only be achieved by letting the BOCs offer data services over their own networks without any LATA restrictions, unbundling requirements, or

resale obligations. This premise is dead wrong in two respects. First, the goal of widespread deployment of advanced telecommunications capabilities can be (and is being) achieved without granting special favors to the BOCs. Second, this goal will be undermined, not promoted, by encouraging BOC entry without adequate regulatory safeguards to assure reasonable competitive access to their bottleneck loop facilities.

As to the first point, the market is already addressing the burgeoning demand for data transmission capacity caused by the exploding use of the Internet over the last few years. Although the BOC Petitions uniformly complain about capacity shortages and lack of access outside of major urban areas, their assertions are based on outdated, historical network deployment information. Not only Level 3, but other carriers such as IXC Communications, Qwest, GTE, Frontier, and more are building thousands of new route-miles of fiber optic transmission capacity, while established carriers such as AT&T, Sprint, and WorldCom are expanding their networks as well. Level 3, among others, is establishing a new Internet backbone network and interconnection points to other backbones, while incumbent providers are expanding their capacity. The market is responding to the public demand for increased capacity and more widespread access to the Internet, and it will do so regardless of whether the BOCs obtain the regulatory relief they seek.[4]

---

[4]Further, Level 3's experience contradicts the assertions of US WEST and (in particular) Bell Atlantic that only these companies are willing to invest in bringing advanced capabilities to rural America. Level 3 owns approximately 48% of Commonwealth Telephone Company ("CTCo"), the Nation's 13th largest independent LEC, which serves about 250,000 access lines in very rural areas of Eastern Pennsylvania. CTCo founded epix Internet Services, which provides Internet access to customers in rural exchanges served by a number of LECs, including some of Bell Atlantic's service territory. Although the BOCs claim that rural ISPs are relegated to low-bandwidth backbone connections, epix recently upgraded its backbone connections from 6 and 10 megabits per second to 45

Nonetheless, Level 3 will readily concede that this alone is not sufficient reason to deny the BOC Petitions. Although there are many carriers who are ready and willing to provide data transmission capacity to meet market demand, one may reasonably ask why the BOCs should not have the same opportunity to participate in this market as Level 3 and other carriers. The answer is that the BOCs, unlike any other carrier in the market (except other incumbent LECs), control a critical bottleneck that they can use to impede competition in advanced telecommunications services. As discussed in the Introduction and in Exhibit A, access to the BOC loop network (either directly or indirectly) is critical to any carrier seeking to provide ubiquitous broadband digital services.

The regulatory "barriers" that the BOCs complain about, like interLATA entry, unbundling, and resale, are there for a reason; they are not just random obstacles scattered in the way of BOC network deployment. Congress imposed these conditions in an effort to prevent the BOCs from using their effective monopoly in one market, the local loop, to impede competition in other markets where their competitors need access to the loop. Even if the Commission had the power to sweep away these restrictions as the BOCs contend, it should not do so unless and until it can be assured that such anti-competitive abuses will not occur.

Ameritech and US WEST, to their credit, at least acknowledge this concern in their Petitions, while Bell Atlantic simply ignores it. Ameritech and US WEST argue that although they should not be required to unbundle those elements of their network that provide "advanced" capabilities, they will continue to make available underlying "basic" network elements, especially loops, and will permit

---

and 24 mbps, respectively (a total bandwidth of approximately one and a half DS3s). *See* <http://www.epix.net>.

competitors to collocate their own data transmission equipment in BOC central offices. *See* Ameritech Petition at 17-19; US WEST Petition at 48-49. US WEST, in particular, gets close to identifying the issue correctly when it argues as follows:

> The specialized equipment used to provide xDSL, such as DSLAMs and ATM switches, are facilities that any competitor can supply, and many do. As Commission staff have recognized, competitors such as WorldCom and Covad now purchase unbundled loops from incumbent LECs and combine them with their own DSLAMs and packet-switched networks to offer ISDN and xDSL to business customers. Because any competitor may purchase DSLAMs from a third-party vendor and collocate them in US WEST's central offices, . . . DSLAMs cannot be a "bottleneck" facility. . . . These are not essential facilities that competitors must go without if US WEST did not unbundle them at cost.

US WEST Petition at 49 (footnotes omitted). The false premise in US WEST's argument, however, is that competitors can be assured of receiving the *same* access to US WEST's loops and central offices that the BOC will provide to its own data communications enterprise. In fact, competitors have already encountered substantial difficulties in obtaining unbundled loops and collocation in US WEST's service area. These problems are likely to get worse if US WEST gains the relief it seeks in this proceeding, since it will have much more to lose if competitors succeed in gaining a toehold in its territory. The same problems are occurring, and can be expected to continue, in other BOC territories.

The problem is not unique to data services, nor is it attributable to the bad faith of particular individuals. Rather, it is an inherent problem that has confronted this Commission at every step in the process of opening telecommunications markets to competition over the span of two generations. An entity that seeks to compete in retail service markets (whether for long distance service, CPE, enhanced services, local exchange service, or now advanced telecommunications) has no incentive to permit its competitors reasonable access to